Supreme Court, U.S.
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No. —— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DECEMBER TERM, 1995

DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD.,
Petitioner,

v.

ANN NEWCOMB and BRUCE NEWCOMB,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

I. Is not a New Jersey State Supreme Court Rule regulating contingent fees in personal injury cases violative of the Commerce Clause of the United States Constitution, when such Rule is applied to a Pennsylvania professional corporation law firm (representing a New Jersey domiciliary) in litigation filed, conducted and concluded in the United States District Court for the Eastern District of Pennsylvania (situated in the Commonwealth of Pennsylvania), whose Standards for Professional Conduct, including the right to regulate counsel fees, are the exact Rules of Professional Responsibility as have been adopted by the Supreme Court of Pennsylvania? (*See* United States District Court for the Eastern District of Pennsylvania Local Rule No. 83.6).

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IN THE

Supreme Court of the United States

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit entered a Per Curiam Judgment Order (Appendix p. 1a) on September 19, 1995, affirming the Summary Judgment entered by the United States District Court for the District of New Jersey in favor of Respondents, Ann Newcomb and Bruce Newcomb, and against the Petitioner, Daniels, Saltz, Mongeluzzi & Barrett, Ltd. The Judgment Order of the United States Court of Appeals for the Third Circuit is printed at Appendix p. 1a.

On December 8, 1994, the United States District Court for the District of New Jersey, per the Honorable John F. Gerry, entered a Final Order in which Summary Judgment was granted in favor of Respondents and against Petitioner.

The Judgment Order and Opinion of the United States District Court for the District of New Jersey are printed at Appendix pp. 1b-14b.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the District of New Jersey, was entered on September 19, 1995 and is printed at Appendix p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651.

STATEMENT OF THE CASE

The instant case involves an appeal from a *Per Curiam* Judgment Order, without supporting opinion, of the United States Court of Appeals for the Third Circuit, entered on September 19, 1995, affirming an Order of the United States District Court for the District of New Jersey entered December 8, 1994, granting Summary Judgment in favor of Ann Newcomb and Bruce Newcomb ("Respondents") and against Petitioner law firm ("Petitioner").

Bruce Newcomb suffered a job related injury on December 1, 1989, when a crane contacted an overhead power line in Trenton, New Jersey, inflicting disabling personal injuries upon Mr. Newcomb. At the time of his injury, Respondent, Bruce Newcomb, and his wife, Ann Newcomb, resided in New Jersey. After the injury, Bruce Newcomb was flown to Crozer-Chester Medical Center in Pennsylvania, where he was admitted for treatment of his injuries. Bruce Newcomb received the majority of his medical treatment for his injuries in Pennsylvania by Pennsylvania doctors, nurses and other health care providers.

On October 24, 1991, Petitioner, the Pennsylvania professional corporation law firm of Daniels, Saltz, Mongeluzzi & Barrett, Ltd., was retained by Respondents, under a Pennsylvania forty (40) percent contingent fee agreement, to represent Respondents in connection with a claim for personal injuries sustained by Mr. Newcomb on December 1, 1989. The

contingent fee agreement was signed at Respondents' home in New Jersey for their convenience, as the Newcombs specifically requested Petitioner's representative to travel to their home to discuss possible representation. However, the Respondents were specifically advised as to the distinction between contingent fee agreements under New Jersey and Pennsylvania law. Respondents were also specifically advised that Petitioner would litigate the suit in Pennsylvania, pursuant to the Pennsylvania contingent fee agreement, according to Petitioner's usual fee arrangement in personal injury representations. It was explained to Respondents by Petitioner, and agreed to by Respondents, that Pennsylvania was a more preferable forum for the litigation than was New Jersey, because of a potentially better jury pool, higher prior jury awards, the potential application of both the more liberal Pennsylvania damage law and the more liberal Pennsylvania product liability law, and the potential application of Pennsylvania's joint and several liability rules, which are more favorable to plaintiffs. Accordingly, Petitioner and Respondents jointly agreed to initiate the litigation in the United States District Court for the Eastern District of Pennsylvania.

Petitioner law firm is a Pennsylvania professional corporation, having been incorporated in Pennsylvania in 1981 and doing business continuously as Attorneys at Law in the Commonwealth of Pennsylvania since that time. On October 31, 1991, Petitioner law firm filed a Complaint on behalf of Respondents in the United States District Court for the Eastern District of Pennsylvania. The discovery in the case was costly, complex and time-consuming and conducted extensively, painstakingly and exclusively by Petitioner law firm. More than twenty (20) depositions were taken in the case, of which all but two (2) were taken in the Commonwealth of Pennsylvania. Several status, discovery and settlement conferences were held in Pennsylvania before the United States District Court for the Eastern District of Pennsylvania.

On or about November 12, 1992, Respondents reviewed and executed a Release Agreement entered into with four (4) of the defendants in settlement of Respondents' claims against those entities for the total amount of Five Hundred Thousand

Dollars ($500,000.00). The proceeds of that Five Hundred Thousand Dollar ($500,000.00) partial settlement were distributed pursuant to the Pennsylvania contingent fee agreement. At the time of the distribution of the partial settlement, Respondents did not question or contest the fact that they were bound by the 40% contingent fee agreement which they had knowingly and voluntarily signed with Petitioner. Accordingly, Respondents reviewed and executed a Statement of Distribution that was prepared pursuant to that 40% contingent fee agreement and settlement funds were dispersed to both Respondents and Petitioner in accordance with said agreement. The remaining portion of the case was listed for trial on February 16, 1993 in the United States District Court for the Eastern District of Pennsylvania. Respondents then settled with the remaining defendants, shortly before jury selection began, for an additional Five Hundred Thousand Dollars ($500,000.00), bringing the total settlement in the case to One Million Dollars ($1,000,000.00).

On March 8, 1993, Respondents executed a Release discharging the remaining defendants to the litigation. Said Release stated that "it is further understood and agreed that this Release is executed and delivered in accordance with, and is to be interpreted and construed by and under, the laws of the Commonwealth of Pennsylvania." On March 31, 1993, Petitioner law firm received a settlement check pursuant to the settlement with the remaining defendants and contacted Respondents to arrange for their negotiation of same.

On April 2, 1993, Petitioner law firm forwarded correspondence to Respondents confirming receipt of the remaining settlement funds and indicated that Petitioner law firm was prepared to make final distribution of the settlement funds. On April 5, 1993, Petitioner received a letter signed by the Respondents, which stated that Respondents "do not believe that the fee agreement which we allegedly signed with you is legal in New Jersey. Consequently, the only fees which you are entitled to and the only reimbursement of costs that you are entitled to should be in accordance with the Rules of the New Jersey courts."

On April 6, 1993, Respondents filed a Complaint for Declaratory Judgment against the Petitioner law firm in the Superior Court of New Jersey, Law Division, Gloucester County. The Complaint contended that the 40% contingent fee agreement was void and unenforceable because of New Jersey Court Rule 1:21-7.

Said Rule 1:21-7 is found in Part I of the Rules governing the Courts of the State of New Jersey. Part I is also known as the Rules of General Application. The very first Rule of General Application, which is the introductory preamble, is 1:1-1 entitled "Applicability: Scope." Rule 1:1-1 provides:

> Unless otherwise stated, the rules in Part I *are applicable to the Supreme Court of New Jersey, the Superior Court, the Tax Court, the Surrogate's Court and the Municipal Courts.* (Emphasis Added).

Clearly, therefore, pursuant to the mandate of its own Court Rules, the New Jersey Supreme Court did not intend any of the Rules of General Application, including 1:21-7, to apply to cases litigated outside of the State of New Jersey.[1] The New Jersey Superior Court, in *Association of Trial Lawyers of America v. New Jersey Supreme Court,* 126 N.J. Super. 577, 316 A.2d 19 (A.D. 1974), *affirmed* 66 N.J. 258, 330 A.2d 350 (1974), has held that Rule 1:21-7 applies *only to cases being litigated in the State of New Jersey* as follows:

---

1. Rule 1:21-7 provides, in pertinent part:

> 1:21-7. Contingent Fees
> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits: (1) 33 1/3% on the first $250,000 recovered; (2) 25% on the next $250,000 recovered; (3) 20% on the next $500,000 recovered; and (4) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and (5) where the amount recovered is for the benefit of a client who was a minor or incompetent when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.

> The contingent fee rule, R.1:21-7, as clarified by a directive issued by the Supreme Court on April 13, 1972, *applies to all matters, whether the case is to be litigated in the state or federal courts in New Jersey,* in which the client's claim for damages is based upon an alleged tortious conduct of another, including products liability claims. (Emphasis Added). *Id.* at 581-582.

Thus, the jurisdictional limit of the Rule was defined by the Appellate Division of the New Jersey Superior Court and *affirmed* by the New Jersey Supreme Court. *The Rule has no extraterritorial effect whatsoever outside of the courts of New Jersey.*

On April 23, 1993, Petitioner law firm filed a Notice of Removal of the action instituted against it by Respondents to the United States District Court for the District of New Jersey based on diversity of citizenship. On July 13, 1993, Respondents filed a Motion for Summary Judgment alleging that no genuine issue of material fact existed and that the 40% contingency fee agreement was void, invalid and unenforceable under New Jersey Court Rule 1:21-7. On September 21, 1993, Petitioner law firm filed a Brief in Opposition to said Motion for Summary Judgment. On December 8, 1994, the United States District Court for the District of New Jersey entered an Order granting the Motion for Summary Judgment of Respondents and Ordered Judgment in favor of Respondents and against Petitioner in the sum of $148,822.10. The Order and Opinion of the United States District Court for the District of New Jersey were based solely on a conflict of law analysis and failed to address or consider in any way the issue of the constitutionality of New Jersey Court Rule 1:21-7. (*See* Appendix pp. 1b-14b).

On September 12, 1995, oral argument on this very compelling and important issue was heard by a panel of the United States Court of Appeals for the Third Circuit. On September 19, 1995, *seven days* after oral argument, the Third Circuit panel issued a Judgment Order. No analysis or reasoning for the decision of the panel was included. No opinion in support of the panel decision was ever filed or issued. (*See* Appendix p. 1a).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The extraterritorial application of a New Jersey State Rule of Court pertaining to contingent fees to a Pennsylvania professional corporation law firm litigating a case in the United States District Court situated in Pennsylvania (and not in New Jersey), on behalf of clients who are New Jersey domiciliaries, is violative of both the Commerce Clause of the United States Constitution and of the Pennsylvania Constitutional Provisions which vest sole and exclusive authority in the Supreme Court of Pennsylvania, and in the Supreme Court of Pennsylvania alone, to regulate the practice of law, including the fees that attorneys may lawfully charge, by law firms and attorneys who practice in all Courts situated in the Commonwealth of Pennsylvania.

Certiorari is essential to prevent grave injustice to the Petitioner, because the Order of the United States District Court for the District of New Jersey, as affirmed by the Judgment Order of the United States Court of Appeals for the Third Circuit, violates the Commerce Clause of the United States Constitution and numerous decisions of this Court.

One of the cornerstone principles of the Constitution of the United States of America is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. This longstanding principle was first announced by this Court in the landmark decision of *Pennoyer v. Neff,* 94 U.S. 714 (1877), in which this Court stated:

> The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, the principles of public law to which we have referred are applicable to them. *One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory* . . . The other principle of public law referred to follows from the one mentioned; that is, *that no state can exercise direct juris-*

diction and authority over persons or property without its territory. Id. at 722. (Emphasis Added).

Under Article V, §10(c) of the Pennsylvania Constitution, the Supreme Court of Pennsylvania is vested with the exclusive power to govern the practice, procedure and conduct of all courts under its jurisdiction and the "admission to the bar" and the practice of law "of all attorneys" who are admitted before the courts of the Commonwealth of Pennsylvania. In furtherance of that Constitutional Mandate, the Supreme Court of Pennsylvania held in *Wajert v. State Ethics Commission,* 491 Pa. 255, 420 A.2d 439 (1980), *that it and it alone had the exclusive power to regulate and govern the conduct of attorneys in Pennsylvania,* thereby invalidating as unconstitutional a statute passed by the Pennsylvania State Legislature attempting to regulate the ability of an attorney to represent clients before the Court of Common Pleas. The Pennsylvania Supreme Court has recognized its own "inherent and exclusive power to govern the conduct of those privileged to practice in this Commonwealth," including the right to regulate counsel fees that may be charged by Pennsylvania lawyers and law firms. *See Wajert, supra,* at 442; *see also Oliastro v. Borough of Ellwood City,* 377 Pa. Super. 181, 486 A.2d 966 (1984).

The United States District Court for the Eastern District of Pennsylvania, the Federal Court in which Respondents' action was filed, litigated and settled by Petitioner law firm, has specifically confirmed that "in the Pennsylvania Constitution Article V, §10(c), the Pennsylvania Supreme Court is given the power to prescribe general rules for admission to the bar and to practice law." *See Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307, 1316 (E.D.Pa. 1973), *affirmed* 487 F.2d 1394 (3d Cir. 1973). The United States District Court for the Eastern District of Pennsylvania has further construed "this provision to cover not merely the original admission to practice law, but to embrace the continuous monitoring of the practice of law". *Id,* n.21. Included in the "regulated conduct of attorneys which falls well within the ambit of the constitutionally discrete power of the judiciary *is the fee charged by lawyers." Heller v. Frankston,* 76 Pa. Cmwlth. 294, 464 A.2d 581, 586 (1983) (Emphasis Added). Moreover, the United

States District Court for the Eastern District of Pennsylvania, in Local Rule of Civil Procedure No. 83.6 (formerly Local Rule of Civil Procedure 14), has specifically provided:

> [t]he Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court[.]

The courts of the Commonwealth of Pennsylvania have held that a forty percent (40%) contingent fee, such as the contingent fee involved in this case, is reasonable, customary and ethical in the Commonwealth of Pennsylvania. *See Oliastro, supra.* Therefore, it is clear beyond peradventure that the Rules of Professional Responsibility promulgated by the Supreme Court of Pennsylvania, and not those of the Supreme Court of New Jersey, governed the fee to be charged by a Pennsylvania law firm in an action initiated, litigated and settled in the United States District Court for the Eastern District of Pennsylvania sitting in Pennsylvania, such as the one involved in the case at Bar.

The Commerce Clause of the United States Constitution provides that "Congress shall have power . . . to regulate commerce . . . among the several states." United States Constitution, Article I, Section 8, Clause 3. The Commerce Clause has been interpreted by this Court on numerous occasions to preclude the application of a state's statute to commerce that takes place wholly outside of the state's borders. *Healy v. Beer Institute, Inc.,* 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986); *Edgar v. Mite Corporation,* 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982) (plurality opinion); *Southern Pacific Company v. Arizona,* 325 U.S. 761, 775, 65 S. Ct. 1515, 1523, 89 L.Ed. 1915 (1945). There can be no question but that New Jersey Court Rule 1:21-7 as applied to Petitioner[2], a Pennsylvania professional corporation law firm, handling a

2. A statute can be unconstitutional either on its face or in its application to a given set of facts. *Washington v. Davis,* 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

case in a federal court situated in Pennsylvania, violates the Commerce Clause and is, therefore, unconstitutional. The United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey, however, have failed to so hold and have absolutely refused to address this issue.

A statute that directly controls commerce occurring outside the boundaries of a state exceeds the inherent limits of the enacting state's authority and is invalid, regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state. *Brown-Forman, supra.* This principle was first discussed by this Court in *Southern Pacific, supra.* In that case, this Court examined the constitutionality of the Arizona Train Limit Law which made it unlawful to operate a railroad train of more than 14 passenger or 70 freight cars within the state. This Court held that the statute violated the Commerce Clause because:

> The practical effect of such regulation is to control train operations *beyond the boundaries of the state exacting it* because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and leaving the regulating state. *Id.* at 775. (Emphasis Added).

More recently, in *Edgar, supra,* this Court was faced with deciding whether the Illinois Business Takeover Act (hereinafter "Illinois Act") violated the Commerce Clause. That statute required a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the terms of the offer 20 days before the offer became effective. The statute also required any takeover offer to be registered with the Secretary of State. This Court held that the Illinois Act violated the Commerce Clause, finding that states have traditionally regulated *intrastate* securities transactions. The Court further noted that it had traditionally upheld "blue-sky" laws and that the rationale for upholding said laws was that they only regulated transactions occurring *within the regulating state. Id.* at 641. This Court stated:

> The Illinois Act differs substantially from state blue-sky laws in that *it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.* A tender offer for securities of a publicly-held corporation is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. *Id.* at 641. (Emphasis Added).

This Court thus held that "the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect". *Id.* at 642. In holding the Illinois Act unconstitutional, this Court articulated:

> *The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state.* In *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 775, 65 S. Ct. 1515, 1523, 89 L. Ed. 1915 (1945), the Court struck down on Commerce Clause grounds a state law where the 'practical effect of such regulation is to control [conduct] beyond the boundaries of the state . . .' *The limits on a state's powers to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'* Id. at 642-643 (Emphasis Added), *citing Shaffer v. Heitner,* 433 U.S. 186, 197, 97 S. Ct. 2569, 2576, 53 L. Ed. 2d 683 (1977).

The issue of extraterritorial regulation was recently addressed by this Court in *Healy v. Beer Institute, Inc., supra.* In *Healy,* Connecticut enacted a statute that required out-of-state beer shippers on the 6th day of each month to post their Connecticut wholesale prices for the following month and to affirm that the posted prices were no higher at the moment of affirmation than those charged in the four states bordering Connecticut. This Court reiterated the established principles that the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the

state's borders, whether or not such commerce has any effect within the state, and that a statute that directly controls commerce occurring wholly outside the boundaries of the state exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. This Court noted that *the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.* In *Healy,* this Court found that the interaction of the Connecticut statute with beer pricing statutes in Massachusetts, New York and Rhode Island had the practical effect of controlling prices in those other states. This Court, therefore, held that the Connecticut statute had the undeniable effect of controlling commercial activity occurring outside the boundary of the state and, as such, was unconstitutional. *Id.*

In the case at Bar, Petitioner is a Pennsylvania professional corporation law firm. The underlying personal injury lawsuit involving Respondents was filed by Petitioner in the United States District Court for the Eastern District of *Pennsylvania* with the knowledge and agreement of Respondents. The entire litigation took place in *Pennsylvania.* The application of New Jersey Court Rule 1:21-7 to Petitioner in connection with a case litigated exclusively in Pennsylvania, under a Pennsylvania Contingent Fee Agreement, is an unconstitutional attempt to apply a New Jersey Court Rule to commerce which is taking place *wholly outside* of New Jersey's borders. By attempting to assert extraterritorial jurisdiction over lawyers and law firms outside of its state, the New Jersey Supreme Court has exceeded the inherent limits of its power. For, as this Court has stated in *Edgar, supra:*

> [t]he limits on a state's powers to enact substantive legislation are *similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons* or property *would offend sister States and exceed the inherent limits of the State's power.' Edgar, supra* at 643 (Emphasis Added), *citing Shaffer v. Heitner,* 433 U.S. 186, 197, 97 S.Ct. 2569, 2576, 53 L. Ed. 2d 683 (1977).

This Court has recognized, in *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 281, 105 S.Ct. 1272, 1277, 84 L.Ed. 2d 205 (1985), that "activities of lawyers play an important part in commercial intercourse." Therefore, it is abundantly apparent that the application of this New Jersey Rule of Court to the factual situation involved herein is a direct restraint on interstate commerce that has a sweeping extraterritorial effect and, as such, is unconstitutional as violative of the Commerce Clause of the United States Constitution, and is in direct contravention of numerous decisions of this Court. *See also Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787-788, 95 S.Ct. 2004, 2013, 44 L.Ed. 2d 572 (1975) ("the exchange of [legal] service for money is 'commerce' in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect[.]"). Accordingly, any attempt to apply New Jersey Court Rule 1:21-7 to a Pennsylvania professional corporation law firm litigating a case in Pennsylvania courts, whether state or federal, violates the Commerce Clause of the United States Constitution.

CONCLUSION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the Summary Judgment entered by the United States District Court for the District of New Jersey, has resulted in a grave injustice to Petitioner and is in direct contravention of numerous decisions of this Court interpreting the Commerce Clause of the United States Constitution. Accordingly, for all of the reasons advanced and asserted in the instant Petition for Writ of Certiorari, Certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5016

ANN NEWCOMB; BRUCE NEWCOMB

v.

DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD.,
Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 93-cv-01757
(Honorable John F. Gerry)

Argued September 12, 1995

Before: MANSMANN, SCIRICA and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered December 8, 1994, be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

Attest:

P. Douglas Sisk, Clerk
SEP 19 1995

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANN NEWCOMB and BRUCE NEWCOMB, *Plaintiff,*	:	Civil Action No. 93-1757 (JFG)
v.	:	
DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD. *Defendants.*	:	ORDER

ENTERED
on
THE DOCKET
on 12-8-1994
WILLIAM T. WALSH, CLERK

This matter having come before the court on a motion by the plaintiffs for summary judgment on the issue of contract reformation; and

The court having considered the submissions of the parties; and for good cause shown;

It is on this 8th day of December, 1994 hereby ORDERED that the motion of plaintiffs for summary judgment is hereby GRANTED and it is further ORDERED that judgment shall be entered in favor of the plaintiffs, ANN NEWCOMB and BRUCE NEWCOMB, and against the defendants, DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD., in the sum of $148,822.10, plus interest.

JOHN F. GERRY, DISTRICT JUDGE

FILED
DEC 8, 1994
AT 8:30 _____M
WILLIAM T. WALSH
CLERK

FILED
XXX X,1994
WILLIAM T. WALSH
CLERK

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRUCE NEWCOMB and ANN NEWCOMB, *Plaintiffs,*	:	Civil Action No. 93-1757
v.	:	
DANIELS, SALTZ, MONGELUZZI & BARRETT, LTD. *Defendant.*	:	OPINION

RECEIVED
APR-7 1994

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Attorneys for Defendant

GERRY, Chief Judge

This case concerns a dispute over attorney's fees charged by the defendant for legal services rendered to the plaintiffs in connection with a personal injury suit. The defendant seeks a change of venue. The plaintiffs oppose the change of venue and seek summary judgment on their claims.

I. BACKGROUND

The defendant is the law firm of Daniels, Saltz, Mongeluzzi & Barrett. The firm represented the plaintiffs, Ann and

Bruce Newcomb, in their lawsuit arising from Mr. Newcomb's December 1, 1989 industrial accident in Trenton, New Jersey. (Affidavit of Bruce Newcomb.) Contact between the parties began in December of 1989 when Robert J. Mongeluzzi, a member of the firm and the New Jersey and Pennsylvania bars, called the plaintiffs at their home in New Jersey to discuss possible representation. (Affidavit of Ann Newcomb at 2.) (Affidavit of Robert J. Mongeluzzi at 2.) Shortly thereafter, Mr. Mongeluzzi visited the Newcombs at their home to discuss the matter, but the parties did not reach any agreement regarding representation at that time. *Id.* For approximately the next 20 months, Mr. Newcomb received New Jersey Workers' Compensation benefits and did not pursue a separate law suit. (Affidavit of Ann Newcomb.)

On October 24, 1991, Mr. Mongeluzzi visited the plaintiffs at home again, and this time the parties signed a contingent fee agreement and the representation commenced. (Affidavit of Ann Newcomb at 3.) (Affidavit of Robert J. Mongeluzzi at 3.) (Contingent Fee Agreement.) The agreement provides that the firm would receive 40% of any recovery, plus costs. (Contingent Fee Agreement, Defendant's Summary Judgment Exh. A.) The plaintiffs did not visit the defendant's Philadelphia offices at any time prior to signing the fee agreement. (Affidavit of Ann Newcomb at 3.) They allege that no member of the firm ever discussed with them the issue of where their case should be filed or the differences between New Jersey and Pennsylvania law on attorney contingent fees. (Affidavit of Ann Newcomb at 3.) The firm asserts that Mr. Mongeluzzi discussed both issues with the plaintiffs before the agreement was signed. (Affidavit of Robert J. Mongeluzzi at 4.)

The firm filed suit on the plaintiffs' behalf in October 1991 in District Court for the Eastern District of Pennsylvania. (See Complaint; Def. Exh. C to Brief in Opposition to Summary Judgment.) Three of the five defendants were Pennsylvania residents. Almost all the numerous depositions taken in the action were taken in Pennsylvania. (Affidavit of Robert J. Mongeluzzi at 8.)

The personal injury case settled in November 1992 for a total of $1,000,000. When the firm advised the plaintiffs of the

amount of the settlement that was attributable to attorney's fees, the plaintiffs refused to permit the payment of the fees and fired the firm. The plaintiffs secured other representation and filed suit in New Jersey Superior Court, claiming that the fee agreement was invalid under New Jersey law. The defendant secured removal of that action to this court on the basis of diversity. After the plaintiffs' attorney's fee suit was filed, but before it was removed, the defendant filed a petition for attorney's fees with the court presiding over the personal injury action in the Eastern District of Pennsylvania. That court refused to hear the matter. (Affidavit of Eugene P. Chell.)

Presently before the court are two motions. First, the defendant moves for a change of venue from the District of New Jersey to the Eastern District of Pennsylvania. Second, the plaintiffs move for summary judgment on their claims.

II. ANALYSIS

A. *Venue*

Section 1404(a) of Title 28 of the United States Code provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In applying this provision, courts assign the plaintiff's choice of forum significant weight unless the case has little connection with the chosen forum. *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *American Tel. & Tel. Co. v. MCI Communications*, 736 F. Supp. 1294, 1306 (D.N.J. 1990). It is thus the defendant's burden to show that transfer would serve the interests enumerated in the statute.

The defendant in the present case seeks a transfer from the District of New Jersey to the Eastern District of Pennsylvania. The defendant argues that such a transfer would be appropriate under § 1404(a) because the Pennsylvania forum

would be more convenient, and because Pennsylvania law would govern the rights under the contract. For the reasons set forth below, we find that defendant has failed to demonstrate that a transfer would be appropriate.

In general, the convenience of the witnesses weighs in favor of transfer under § 1404(a), when the chosen forum would make some witnesses unavailable to testify. *E.g., Bartolacci v. Corporation of the Presiding Bishop,* 476 F. Supp. 381, 383 (E.D. Pa. 1979). The interests of the parties weigh in favor of transfer under § 1404(a) usually only when one of the parties can exhibit a lack of ability to attend the proceedings in the chosen forum. *E.g., Kimball v. Schwartz,* 580 F. Supp. 582, 588 (W.D. Pa. 1984) In this case, these two interests are closely related because the major witnesses in the case will be the parties themselves.

Here, the defendant has failed to allege that the assignment of this case to the New Jersey venue would disserve either the convenience of the parties or the convenience of the witnesses. Further, the defendant has not shown that the Pennsylvania forum would better serve either of these interests. The plaintiffs live in New Jersey. The defendant is a law firm located in Philadelphia, a very short distance from the Camden venue, and affiliated with another law firm located in New Jersey. Thus, the defendant has not alleged that the assignment of the case to the New Jersey venue would make any of the parties, or even other incidental witnesses in this case, unable to attend trial. In fact, the defendant has not even established that the New Jersey forum would be significantly inconvenient for the parties or the witnesses. Therefore, the first two factors in the venue analysis, convenience of the parties and convenience of the witnesses, do not favor transfer.

The defendant firm has similarly failed to show that the interests of justice demand a transfer in this case. It does not allege that it will be unable to properly defend itself if the case is litigated in the District of New Jersey. It does not demonstrate any inherent unfairness in the plaintiffs' decision to pursue this matter in New Jersey.

To support their argument that a transfer is in order here, the defendant seems to simply assert that it would be more

natural and more logical for the court that handled the underlying personal injury matter to address this attorney's fee dispute, both because the court there "witnessed" the performance of this contract and because Pennsylvania law applies. We cannot accept this argument. There is no reason why this court would be unable to apply Pennsylvania law competently, assuming that Pennsylvania law were to apply.[1] Further, the defendant has cited no case where a court has granted a transfer of venue under such circumstances. Moreover, the court that presided over the underlying personal injury dispute refused to hear the attorney's fee dispute. Therefore, the plaintiffs' choice to file the case in New Jersey was not inappropriate and is in fact entitled to substantial weight.

In sum, having found no basis for transferring the case from this District to the Eastern District of Pennsylvania, we deny the defendant's motion for a change of venue.

B. *Summary Judgment*

The plaintiffs argue that they are entitled to summary judgment holding the fee agreement void and unenforceable and reforming the contract to comply with New Jersey law. On a motion for summary judgment, the burden is on the moving party to show that no genuine issue of material fact exists. *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987); Fed. R. Civ. P. 56. In considering such a motion, the court views the record in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bishop v. Wood*, 426 U.S. 341 (1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983); *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981). An issue is genuine when the evidence proffered by the non-moving party is such that a reasonable fact finder could find for that party. *Equimark*, 812. F.2d at 144.

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1. This issue is the major point of contention in this case, as discussed below. The plaintiffs claim that the contract would be governed by New Jersey law because New Jersey was the place where this contract was negotiated and formed.

1. *Choice of Law*

The issue of which state's law should apply is the major point of contention in this case. The defendant contends that Pennsylvania law, which would permit the 40% fee arrangement, applies. The plaintiffs contend that New Jersey law, which would limit the fee to a significantly lower percentage, applies. In a diversity action, the court's choice of law is governed by the law of the state where the court sits. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Shuder v. McDonald's Corp.*, 859 F.2d 266, 269 (3d Cir-1988). Thus, New Jersey choice of law rules apply in this case.

The defendant firm points out that New Jersey choice of law rules generally favor the enforcement of an express choice of law by the parties to a contract, and urges that such an express choice of law exists here. Although the defendant acknowledges that the contract at issue never explicitly mentions Pennsylvania law, the defendant argues that the 40% fee arrangement suggests that the parties intended Pennsylvania law to apply because such a provision would be valid only under Pennsylvania law.[2] The defendant further argues that Mr. Mongeluzzi's discussions with the Newcombs prior to the signing of the contract, wherein he advised the Newcombs of the differences between Pennsylvania and New Jersey contingent fee law further support the contention that the 40% provision expresses the parties' intention to have Pennsylvania law apply.

Based on the defendant's argument, we acknowledge that at least one genuine issue of fact relevant to the issue of whether the parties made an effective choice of law remains. However, for the reasons set forth below, we conclude that any fact relevant to this issue is immaterial to the resolution of the case, because even if we were to assume that the parties

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2. In support of its argument that there need not be an explicit designation of a particular state in a contract for a court to conclude that an effective choice of law was made, the defendant cites Comment (a) to Restatement (Second) of Conflict of Laws § 187 and *Gray v. Joseph J. Brunetti Constr. Co.*, 266 F.2d 809, 815 (3d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

made an explicit choice of Pennsylvania law in this contract, this court could not enforce such a choice.

Under New Jersey law, if the parties to a contract agree that a particular state's law will govern their rights and duties under the contract, the courts will generally honor the agreement, unless:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187; *see also Instructional Systems v. Computer Curriculum Corp.*, 130 N.J. 324, 341-42 (1992). The present facts present a situation calling for the application of § 187(b).

In order to override the choice of law of the parties to the contract under the considerations of § 187 (b), a court must find: (1) that the application of Pennsylvania law would be contrary to a fundamental policy of New Jersey; (2) that New Jersey has a materially greater interest than Pennsylvania in the determination of the particular question at issue; and (3) that under the general choice of law considerations of § 188 of the Restatement (Second) of Conflict of Laws, New Jersey law would apply.

In *Winer Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 208 N.J. Super. 666, 506 A.2d 817 (App. Div. 1986), a New Jersey Appellate Division court found a situation that met all three of these criteria. There, the choice of law provision called for the application of the law of the franchisor's state, Connecticut. In refusing to enforce the provision, the court observed that New Jersey franchise laws, which were more favorable to the franchisee, were designed to protect franchisees from franchisors who tended to be more powerful contracting parties.

The court reasoned that the application of Connecticut law to the contract would violate New Jersey policy by permitting franchisors to wipe away New Jersey's efforts at protection with a sweep of the pen. The court further reasoned that New Jersey's interest in the particular contract was greater than Connecticut's interest because the franchisee was located in New Jersey. It assumed that Connecticut would apply its own law in cases where the franchisee was located in Connecticut. Therefore, the court refused to enforce the choice of law provision. After finding that New Jersey had a more significant relationship to the parties and the contract than Connecticut under the § 188 factors, the court applied New Jersey law. The New Jersey Supreme Court cited this approach with approval in *Instructional Systems v. Computer Curriculum Corp.*, 130 N.J. 324, 343 (1992).

The facts of the present situation compel reasoning similar to that employed in *Winer Motors*. First, we find that under the present circumstances, as under the circumstances in *Winer Motors*, the choice of another state's law would violate New Jersey public policy. New Jersey has a strong interest in regulating the economic relationship between New Jersey attorneys and their clients in tort cases. *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 126 N.J. Super. 577, 588, 316 A.2d 19, 316 A.2d 19, 24-25 (App. Div. 1974), *aff'd*, 66 N.J. 258, 330 A.2d 350 (1974); *see also Kingman v. Finnerty*, 198 N.J. Super. 14, 486 A.2d 342 (App. Div. 1984); *Bernick v. Frost*, 210 N.J. Super. 397, 510 A.2d 56 (App. Div. 1986). Just as New Jersey's franchise laws are designed to protect franchisees, New Jersey's contingent fee rules are designed to protect clients negotiating fee arrangements from the greater knowledge and bargaining power of their attorneys. *American Trial Lawyers Ass'n*, 126 N.J. Super. at 588, 316 A.2d at 24-25. One New Jersey court has noted that when the contingent fee rule was promulgated, the Director of the Administrative Office of the Courts issued a notice to the bar emphasizing this policy:

> The Supreme Court considers that *[the limits set forth in R. 1:21-7(c)] apply to any Contingent Fee arrangement in a tort matter entered into by a New Jersey attorney, without regard to the Court in which an action may subse-*

> *quently be filed,* and to any participation by a New Jersey attorney in a Contingent Fee arrangement entered into outside the State of New Jersey with respect to litigation in this State. This is not intended to deny the authority of the Federal Courts to apply a different standard to implement some other Federal policy.

Notice to the Bar, 95 N.J.L.J. 341 (1972) (emphasis added), (quoted in *Bernick,* 210 N.J. Super at 404, 510 A.2d at 60).

As indicated in this notice, the policy embodied in the fee limitation rule extends to the present facts. Here, a New Jersey attorney entered into a contingent fee arrangement in New Jersey in connection with a cause of action for which the attorney subsequently filed a claim in another state. In fact, the present facts provide even more support for the application of New Jersey public policy than the situation described in the notice: the subject of the underlying dispute was an accident that took place in New Jersey.

Judicial enforcement of a choice of law provision such as the one at issue here would permit attorneys to circumvent the strong public policy of the State of New Jersey in protecting its citizens. Like the enforcement of the choice of law provisions included in franchise contracts by franchisors discussed in *Winer Motors,* it would permit attorneys to wipe away the protective effects of the New Jersey contingent fee limitations "with the sweep of a pen."[3]

Applying the second prong of the § 187 analysis in light of the *Winer Motors* reasoning, we find that New Jersey has a greater interest in applying its law to the particular circumstances than does Pennsylvania. Although Pennsylvania has an interest equal to New Jersey's in protecting its citizens from the overreaching of attorneys in contingent fee cases, Pennsylvania's interest does not apply where the client involved is a New Jersey citizen injured in New Jersey who negotiated his contingent fee contract in New Jersey with a New Jersey-

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3. In fact, if we were to find an explicit agreement regarding the choice of law in this case, we would permit the attorney to frustrate New Jersey policy with even less than the sweep of a pen: the contract at issue here did not even contain the words "Pennsylvania law."

licensed attorney. Like the *Winer Motors* court, we assume that the other state with an interest here would apply its own law in converse circumstances: we assume that Pennsylvania would apply its own contingent fee law to a case where the Pennsylvania client who was injured in Pennsylvania negotiated his contingent fee contract in Pennsylvania with a Pennsylvania-licensed attorney. Thus, we conclude that New Jersey has a materially greater interest than Pennsylvania in the determination of the issues here.

The third § 187 consideration requires us to consider whether New Jersey has a more "significant relationship," as defined by § 188, to the contract or transaction than Pennsylvania does. *See, e.g., Winer Motors,* 208 N.J. Super. at 672-73; *Instructional Systems,* 130 N.J. at 342-43; *Bernick v. Frost,* 210 N.J. Super. 397, 403, 510 A.2d 56, 59 (App. Div. 1986), *cert. denied,* 105 N.J. 511, 523 A.2d 158 (1986). Section 188 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction under the principles stated in § 6.[4]
>
> (2) the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an

4. Section 6 of the Restatement provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

issue include:

(a) the place of contracting,
(b) the place of negotiations of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . . .

We conclude that New Jersey law would apply under these factors.

In following § 188's directive that we evaluate the various contacts enumerated "according to their relative importance with respect to the particular issue," we find that some of the § 188 factors weigh more heavily than others in the context of this case. The goal of the contingent fee limitations in achieving client protection counsels in favor of assigning greater weight to the place of contract, the place of negotiation and the domicile of the clients, rather than the place of performance. The former factors focus on the clients' location and their reasonable expectations when entering into an attorney's fee agreement.

Given these considerations, we find that New Jersey holds a greater interest in having its state's law applied than does Pennsylvania. The clients to be protected here, the plaintiffs, lived in New Jersey. The negotiations took place in their New Jersey home. Furthermore, the attorney who contacted the plaintiffs, Mr. Mongeluzzi, is a member of the New Jersey bar. The only factor weighing in favor of the application of Pennsylvania law in this case is that the performance was to take place in Pennsylvania. This factor being less important in this particular consideration, and all the other more important factors weighing in favor of the application of New Jersey law, we

conclude that New Jersey law would apply under the "most significant relationship" test of § 188.

In sum, following the reasoning in *Winer Motors*, we find that the contravention of the strong New Jersey public policy protecting clients in attorney contingent fee contracts by the choice of Pennsylvania law under the circumstances demonstrated here should not and would not be countenanced by a court of this state. Further, we find that New Jersey holds a more significant interest in having its law applied in such circumstances. Finally, in applying general choice of law principles, we find that New Jersey has the more significant relationship to the contract in this case. We accordingly hold that we would refuse to enforce the agreement in this case if there was one, and that New Jersey law applies here.

2. *Application of the Law*

New Jersey Court Rule 1:21-7 provides:

> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> (1) 33 1/3% on the first $250,000 recovered;
>
> (2) 25% on the next $250,000 recovered;
>
> (3) 20% on the next $500,000 recovered . . . .
>
> (d) The permissible fee provided for in paragraph c shall be computed on the net sum recovered after deducting disbursement in connection with the institution and prosecution of the claim, . . .

The contingent fee at issue here clearly violates this rule. It calls for the clients to pay 40% of the recovery plus costs. As such, it must be held invalid and unenforceable and must be reformed to comply with Rule 1:21-7.

III. CONCLUSION

For the foregoing reasons, we grant the plaintiffs' motion for summary judgment, and hold that the contract at issue is invalid and unenforceable under New Jersey Court Rule 1:21-7. We hold that the contract must be reformed to comply with New Jersey Court Rule 1:21-7. However, we reserve judgment on the issue of the appropriate reformation of the agreement because the parties have not adequately briefed that issue.

JOHN F. GERRY, CHIEF JUDGE

DATED: April 4, 1994 .